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September 11, 1995

HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center
Room 110
Tallahassee, Florida 32399-0850

Re: Docket No. 920199-WS

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of Southern States Utilities, Inc. are the following documents:

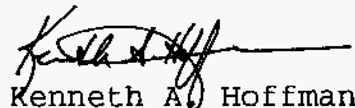
1. Original and fifteen copies of Southern States Utilities, Inc.'s Memorandum in Opposition to Joint Petition for Implementation of Stand-Alone Rates and Repayment of Overcharges; and

2. A disk in Word Perfect 6.0 containing a copy of the document entitled "GIGA.Response."

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,



Kenneth A. Hoffman

KAH/rl

cc: All Parties of Record

ACK
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08912 SEP 11 95
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of Southern States Utilities, Inc. and Deltona Utilities, Inc. for Increased Water and and Wastewater Rates in Citrus, Nassau, Seminole, Osceola, Duval, Putnam, Charlotte, Lee, Lake, Orange, Marion, Volusia, Martin, Clay, Brevard, Highlands, Collier, Pasco, Hernando, and Washington Counties.	Docket No. 920199-WS Filed: September 11, 1995

FILE COPY

SOUTHERN STATES UTILITIES, INC.'S MEMORANDUM IN OPPOSITION TO JOINT PETITION FOR IMPLEMENTATION OF STAND-ALONE RATES AND REPAYMENT OF OVERCHARGES

Southern States Utilities, Inc. ("SSU"), by and through its undersigned counsel, hereby files its Memorandum in Opposition to the Joint Petition for Implementation of Stand-Alone Rates and Repayment of Overcharges ("Joint Petition") filed by Sugarmill Woods Civic Association, Inc. ("Sugarmill Civic"), the Board of County Commissioners of Citrus County ("Citrus County") and a non-party, Spring Hill Civic Association, Inc. ("Spring Hill Civic"), hereinafter referred to collectively as the "Joint Petitioners".

I. MATERIAL FACTS

1. An interim rate increase of approximately $7.3 million was approved by the Commission on August 18, 1992. <u>See</u> Order Nos. PSC-92-0948-FOF-WS and PSC-92-0948A-FOF-WS. The interim rates were implemented by SSU in September of 1992. The interim rate structure approved by the Commission took the pre-rate case "stand-alone" rates for each group of SSU's land and facilities and

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increased those stand-alone rates by adding the same dollar amount per equivalent residential connection. Thus, each customer class received the same amount of base facility charge and gallonage charge increases pursuant to the approved interim rate structure. In contrast to the interim rate structure, the final uniform rates reflected a consolidation of total utility rate base, O&M expenses and other relevant costs to derive a statewide rate. Interim rates were facilities-specific "stand-alone" rates increased on a uniform basis. Final rates were total company rates.

2. On March 22, 1993, the Commission issued its Final Order in the GIGA rate case approving a total revenue increase of approximately $6.7 million. The Final Order adjusted the interim revenue increase to approximately $6.3 million and ordered SSU to refund the difference between the original interim increase of $7.3 million and the final adjusted interim increase of $6.3 million. See Order No. PSC-93-0423-FOF-WS issued March 22, 1993.

3. On April 6, 1993, Motions for Reconsideration were filed by SSU (OPEBs), Hernando County (bulk wastewater rate), Office of Public Counsel ("OPC") (gain on condemnation and no acquisition adjustment), COVA (statewide uniform rates) and Citrus County (statewide uniform rates). **Citrus County/Sugarmill Civic failed to request a stay of the statewide uniform rates pending disposition of the motions for reconsideration.**

4. Also on April 6, 1993, SSU filed a Motion to Stay that portion of the Final Order requiring SSU to refund the difference between the originally approved interim revenues ($16,347,596 -

water; $10,270,606 - wastewater) and revised interim revenues per the Final Order ($15,277,225 - water; $9,990,709 - wastewater) pending disposition of the motions for reconsideration. That motion was granted by Order No. PSC-93-0861-FOF-WS issued June 8, 1993.

5. On July 20, 1993, all motions for reconsideration filed by the parties were denied by vote taken at an Agenda Conference. Subsequently, on August 17, 1993, in response to a petition filed by SSU to defer recovery of OPEB expenses in another docket, Commissioner Clark moved to reconsider the interim refund calculation in the Final Order. Commissioner Clark's motion was granted at the September 28, 1993 Agenda Conference resulting in new revised interim revenue requirements of $15,596,621 (water) and $10,101,174 (wastewater). The interim refunds of $750,975 for water and $169,432 for wastewater were completed in the January-February, 1994 time period.

6. SSU's tariff pages reflecting the final statewide uniform rates were approved effective for service rendered on or after September 15, 1993.

7. Citrus County/Sugarmill Civic filed a Notice of Appeal on October 8, 1993. By that date, SSU had processed nearly fifty billing cycles under the uniform rate. Citrus County/Sugarmill Civic filed an Amended Notice of Appeal on October 12, 1993, and filed a Second Amended Notice of Appeal on November 18, 1993.[1]

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[1]OPC filed a Notice of Appeal on November 19, 1993 and an Amended Notice of Appeal on January 5, 1994.

8. On October 19, 1993, SSU filed its Motion to Vacate Automatic Stay. Under Commission precedent, it appeared that the filing of the Notice of Appeal by Citrus County triggered an automatic stay under Rule 9.310(b)(2), Florida Rules of Appellate Procedure, and Commission Rule 25-22.061(3)(a), Florida Administrative Code. In its Motion to Vacate Automatic Stay, SSU took the position that no bond was necessary because "no refund liability would exist since the determination of rate structure would be revenue neutral...." Alternatively, SSU requested that the stay be vacated upon the filing of a corporate undertaking or bond.

9. On October 26, 1993, Citrus County filed its Response as well as a Motion for Reduced Interim Rates, Recalculated Bills, Refunds and Penalties ("Motion for Refunds"). In its Motion for Refunds, Citrus County requested the Commission to refund to all customers the difference between the stand-alone interim rates and the uniform rates which became effective on September 15, 1993, with interest.

10. The Order on Reconsideration was issued November 2, 1993. See Order No. PSC-93-1598-FOF-WS.

11. On or about November 10, 1993, Citrus County pursued a second request for refunds of the difference between interim rates and final uniform rates by requesting such relief in its Emergency Motion to Enforce Automatic Stay and Suggestion for Contempt filed with the First DCA.

12. On November 23, 1993, oral argument was held on SSU's Motion to Vacate Automatic Stay and Citrus County's Motion for Refunds. A review of pages 52-66 of the transcript (copy attached as Exhibit "A") confirms the following:

a. SSU maintained the position that it was not putting itself at risk by implementing the statewide uniform rates because of the revenue neutral nature of Citrus County/Sugarmill Civic's appeal. Comments of Commissioners confirm that the issue of whether SSU was required to make refunds to specific customers who paid higher rates under the uniform rate structure was not being determined by the Commission at that time.

b. The purpose of the $3 million bond was to protect customers in the event of a reversal on appeal of total revenue requirements issues or reversal on the rate design issue if there was a subsequent determination by the Commission that refunds were due. SSU maintained and maintains that any order requiring refunds which does not permit SSU to recover a commensurate amount in some other fashion would violate the United States Constitution and the Constitution of the State of Florida and would otherwise be unlawful.

SSU's Motion to Vacate Automatic Stay was granted. Citrus County's Motion for Refunds was denied.

13. On December 7, 1993, the First DCA denied Citrus County's second request for refunds set forth in its Emergency Motion to Enforce Automatic Stay and Suggestion for Contempt.

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14. On December 14, 1993, the Commission issued its Order Vacating Automatic Stay. See Order No. PSC-93-1788-FOF-WS. Pertinent portions of the Order are consistent with the clear indication that the refund issue was not decided but potentially deferred to a later date.

> We are concerned that the utility may not be afforded its statutory opportunity to earn a fair rate of return, whether it implements the final rates and loses the appeal or does not implement final rates and prevails on appeal. Since the utility has implemented the final rates and has asked to have the stay lifted, we find that the utility has made the choice to bear the risk of loss that may be associated with implementing the final rates pending the resolution of the appeal.
>
> . . .
>
> By providing security for those customers who may have overpaid in the event the Final Order is overturned, the customers of this utility will be protected in the event a refund may be required..... [I]n the event the Final Order is not affirmed, the utility may lose revenues which this Commission determined the utility to be entitled to have the opportunity to earn. (Emphasis supplied).

Order Vacating Automatic Stay, at 4-5.

15. In the Order Vacating Automatic Stay the Commission also denied Citrus County's Motion for Refunds. Pursuant to Sections 367.084 and 367.081(6), Florida Statutes, the Commission determined that SSU "... had the authority to charge the rates set forth in the Final Order pursuant to the provisions of the Final Order and the tariffs which were approved on September 15, 1993."[2] The

[2]Order Vacating Automatic Stay, at 7. As applied to this case, Section 367.084 authorized SSU to implement the uniform rates by the filing of tariffs immediately after the July 20,

Commission emphasized:

> [I]t is the County which has placed the utility in this situation by waiting months to invoke the automatic stay through the filing of the appeal without seeking any kind of stay pending reconsideration. The County knew through discussions at a previous Agenda Conference that the utility would have the authority, pursuant to the Final Order and applicable rules and statutes, to implement the final rates prior to the conclusion of reconsideration. The Commission's oral decision to deny the County's and COVA's motions for reconsideration was made on July 20, 1993. Yet, the County waited until October 8, 1993 to abandon its request for reconsideration and file its appeal which initiated the automatic stay. In the time between the Commission decision and the filing of the appeal the utility implemented final rates. Once the utility implemented final rates, the County's automatic stay placed the utility in the difficult situation of having to change its rate structure again or to expeditiously seek relief from the stay. (Emphasis supplied.)[3]

16. On January 25, 1994, Citrus County pursued a third request for refunds by filing a Motion with the First DCA requesting review of the Order Vacating Automatic Stay which included the Commission's Order Denying Citrus County's initial request for refunds. The First DCA denied Citrus County's Motion to Review the Order Vacating Automatic Stay by Order dated March 2, 1994.

17. On April 6, 1995, the First DCA issued its decision reversing the statewide uniform rate structure. Citrus County v.

1993 official vote of the Commission denying Citrus County's and Sugarmill Civic's motions for reconsideration of the rate structure issue.

[3] Id.

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Southern States Utilities, Inc., 20 Fla. L. Weekly D838 (Fla. 1st DCA April 6, 1995), as amended on rehearing, 20 Fla. L. Weekly D1518 (June 27, 1995). The court's decision was premised on its legal conclusion that the service areas (land and facilities) at issue must be found to have been part of one system pursuant to Sections 367.171(7) and 367.021(11), Florida Statutes, in order to have a uniform rate structure, and that no such showing had been made in the proceeding below.

18. Following the issuance of the Court's initial opinion on April 6, 1995, SSU and the Commission timely filed Motions for Rehearing. Citrus County filed its Response to the Motions for Rehearing including the following prayer for relief:

> ... Citrus County would respectfully request that the Court make abundantly clear that it has reversed the uniform rates as being unlawful, that the stand-alone rates calculated by the PSC in its final order are the correct and only lawful rates, and that the next action for the PSC to undertake is to order customer refunds to those individuals who have been unlawfully overcharged for 32 months now.[4]

19. The Court chose not to grant Citrus County's fourth request for refunds in issuing its Amended Opinion on Rehearing on June 27, 1995.

20. On July 20, 1995, SSU filed its Notice to Invoke Discretionary Jurisdiction with the Supreme Court of Florida. SSU's

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[4]See Citrus County's Response to Motions for Rehearing, etc., and Suggestion for Motion to Show Cause Why Monetary and Other Sanctions Should Not be Imposed, at 12-13 in Citrus County, Florida v. Southern States Utilities, Inc., First DCA Case Nos. 93-3324 and 93-4089.

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request that the Supreme Court of Florida invoke its discretionary jurisdiction to review the First DCA's decision in this matter remains pending.

21. On July 28, 1995, the Commission filed its Notice of Joinder with SSU as a Petitioner in the Florida Supreme Court proceeding and adopted SSU's jurisdictional brief.

II. ARGUMENT

A. THE JOINT PETITIONERS' REQUEST FOR STAND-ALONE RATES SHOULD BE DENIED.

22. The First DCA's refusal to grant Citrus County's Request for Clarification that the only rate structure to be implemented in lieu of the uniform rates must be stand-alone rates should not go unnoticed by the Commission. Absent a reopening of the record to address all rate structure related issues, there is an utter lack of competent substantial evidence supporting a stand-alone rate structure. The record in the technical hearing in this proceeding demonstrates that only one witness advocated stand-alone rates. That position was taken by Mr. Jones, Sugarmill Civic's president and admittedly a non-expert on rate structure issues. On the other hand, ample testimony was presented in the record addressing both uniform rates and a capped rate structure similar to that recommended by the staff in its August 31, 1995 staff recommendation.

23. SSU has filed a rate increase application in Docket No. 950495-WS requesting a uniform rate structure. In Order No. PSC-95-0894-FOF-WS issued in Docket No. 930945-WS, the Commission found that SSU operated one system statewide based on overwhelming

evidence produced in the record of that docket. Order No. PSC-95-0894-FOF-WS also confirms the Commission's jurisdiction over all SSU facilities and land statewide. The evidence produced by SSU in Docket No. 930945-WS to establish SSU's operation of one utility system is in all material respects identical to the evidence produced in SSU's application and supporting information in Docket No. 950495-WS. Although Order No. PSC-95-0894-FOF-WS in Docket No. 930945-WS has been appealed by the counties who were parties to that docket, and the implementation of that Order automatically stayed, the Commission's finding that SSU operates as one system remains intact and continues to have precedential value.

24. It would be impossible as a practical matter for SSU to revert to a non-uniform rate structure prior to the Commission's expected October 6 establishment of an interim rate structure in Docket No. 950495-WS. Consistent with Commission practice, SSU requests that the Commission take official recognition of Order No. PSC-0894-FOF-WS in this docket and that uniform rates be approved in this docket based on said jurisdictional finding. SSU continues to request that interim rates be established in Docket No. 950495-WS based on the uniform rate structure requested in that docket. SSU's request is based upon the Commission's prior finding that SSU operated one system and the fact that the pre-filed MFRs and supporting information in Docket No. 950495-WS substantiate such finding.

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B. THE JOINT PETITIONERS' REQUEST FOR REFUNDS SHOULD BE DENIED BASED ON THE PRINCIPLE OF THE LAW OF THE CASE

25. The legal doctrine of law of the case binds a lower tribunal to decisions made by an appellate court in a former appeal on issues that were actually or impliedly presented to the Court in the former appeal involving the same action. Alford v. Summerlin, 423 So.2d 482, 485 (Fla. 1st DCA 1982); Barry Hinnant, Inc. v. Spottswood, 481 So.2d 80, 82 (Fla. 1st DCA 1986). The questions of law decided on an appeal "... must govern the case in the same court and the trial court throughout all subsequent stages of the proceeding, whether correct on general principles or not, so long as the facts on which the decision was predicated continue to be the facts in the case." Barry Hinnant, 481 So.2d at 82. Further, the doctrine applies to a specific issue raised by a party even though the court may not discuss that specific issue in its order addressing the relief sought by the party. Sloane vs. Sloane, 625 So.2d 1236, 1237 (Fla. 4th DCA 1993).

26. In this case, Citrus County first requested the Commission to order refunds based on the difference between interim stand-alone rates and uniform rates in its Motion for Refunds. The Motion for Refunds was denied by the Commission and the Commission's decision was affirmed on appeal. Citrus County also filed an Emergency Motion directly with the First DCA requesting that such refunds be made and the First DCA denied that Motion. Finally, after the First DCA reversed the Commission's uniform rate structure, Citrus County requested the First DCA to order that

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refunds be made based on the difference between interim and permanent stand-alone rates and the uniform rates. The Court declined to grant that request. Citrus County has placed the issue of refunds before the First DCA three times. The court has refused to grant the relief requested by Citrus County. The Court's refusal to order the refunds requested by Citrus County represents the law of the case and is binding on the Commission. Accordingly, the Joint Petitioners' request for refunds, including the **fifth** request for refunds made by Citrus County, must be denied.

C. JOINT PETITIONERS' REQUEST FOR REFUNDS <u>SHOULD BE DENIED ON THE MERITS</u>

27. The Joint Petitioners offer nothing to the Commission in the form of legal precedent or legal authority in support of their request for refunds . The three essential grounds which the Joint Petitioners offer in support of their request for refunds are discussed below.

a. First, in an argument indicative of the lack of legal support for their request, the Joint Petitioners imply that counsel for SSU acknowledged SSU's obligation to make refunds if the uniform rate structure was reversed at the oral argument on SSU's Motion to Vacate Automatic Stay. A review of the transcript confirms that the Joint Petitioners misstate the facts. The cited portion of transcript in paragraph 7 of the Joint Petition fails to support the Joint Petitioners' contention as the quote therein emphasizes that SSU's counsel represented to the Commission that SSU had a bond on file "... which would cover <u>any obligations</u> of Southern States to make refunds to customers should the appellate

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court reverse the Commission." (Emphasized supplied.) The Joint Petitioners then apparently unwittingly include an excerpt from the transcript on the bottom of page 7 of the Joint Petition which undermines their allegation:

> CHAIRMAN DEASON: And what Mr. Hoffman is saying, it's his opinion that the Company is not putting itself at risk, it does not have the liability to make the customer-specific whole. Their only requirement is to make customers as a general body of ratepayers whole. That is, if they have collected more total revenue than what they are authorized as a result of the final decision on appeal, they are liable for that, but they are not liable to make specific customers whole.

Further, and worse from the standpoint of candor, the Joint Petitioners conveniently fail to point the Commission to the following excerpts from the transcript:

> CHAIRMAN DEASON: Let me ask you this. If the stay is vacated, do you agree that Southern States is putting itself at risk to make those customers whole whose rates are higher under statewide rates?
>
> MR. HOFFMAN: No, I don't. But I don't think that the Commission needs to resolve that issue today. Because in our opinion, Mr. Chairman, we believe that on a rate structure appeal, where we are implementing the rates authorized by the Commission, in an appeal which would be strictly revenue neutral, that the company does not place itself at risk.

See Exhibit "A", excerpts of transcript of November 23, 1993 oral argument, at pages 52-53. Accordingly, the Joint Petitioners' allegation that the company acknowledged an obligation to make refunds in the event of reversal of the rate structure issue on appeal is specious.

b. Secondly, the Joint Petitioners assert that the Order Vacating Automatic Stay contains language which required SSU to make refunds if the rate structure issue was reversed and that the Commission ordered SSU to post a bond for that very purpose. Again, the Joint Petitioners miss the mark. The Order Vacating Automatic Stay contains two passages (see paragraph 14 above) which state that the utility may be required to bear a risk of loss in the event the rate structure issue was reversed. These passages in the Order Vacating Automatic Stay are consistent with the comments made by the Commissioners at the oral argument which confirm that the Commission declined to address the issue of refunds at that time. The bond, of course, was posted as required by Commission Rule 25-22.061(3)(a), Florida Administrative Code, and to provide adequate security in the event: (1) the rate structure issue was reversed; and (2) the Commission determined that SSU was responsible to make refunds.

c. Finally, the Joint Petitioners rely on the April 6, 1995 opinion of the First DCA to support their request for refunds. There is nothing in the Court's opinion which even remotely addresses the issue of refunds. Presumably, that is why Citrus County made an affirmative request in its response to the Motions for Rehearing that the Court order that refunds be made. The request was not granted. The Court's refusal to grant Citrus County's request only confirms that a refund requirement was not contemplated by the Court's decision.

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28. The Joint Petitioners' request for refunds has no basis in law. It should be noted that Spring Hill Civic is not a party to this proceeding and lacks standing to pursue a request for refunds in this docket.[5] In addition, the request for refunds based on the difference between the interim rates and the uniform rates is easily disposed of. SSU notes again that the Commission already has refused such a request on one occasion and the First DCA has refused to grant the same request on two occasions. No party appealed the Interim Rate Order nor challenged the interim rate structure on appeal. Further, since the uniform rates were not implemented by SSU until September of 1993, there is no factual basis to even consider a request for refunds based on uniform rates which were in effect between September of 1992 and September of 1993. This leaves the issue of the request for refunds for customers whose permanent rates were higher under the uniform rate structure. The grounds supporting the denial of this request are set forth below.

There is No Legal Authority to Treat an Appeal of a Rate Structure Issue as Anything Other than a Total Revenue Requirements Issue

29. There is no dispute that the total revenue requirements ordered by the Commission in the Final Order were affirmed on appeal. Citrus County and COVA have acknowledged that the rate structure issue that they pursued on appeal is a revenue neutral issue, a position patently inconsistent with any renewed request

[5]To the extent other customers are deemed to be parties through the intervention of OPC, OPC never challenged the uniform rate structure before the Commission nor on appeal.

for a refund. Any action by the Commission to modify the Court's affirmance of SSU's total revenue requirements by ordering refunds would be inconsistent with and a clear violation of the First DCA's decision and mandate. SSU submits that the Commission simply lacks the authority to modify the total revenue requirements affirmed by the Court.

The Granting of Refunds Would Constitute an Unconstitutional Taking of Property

30. In Gulf Power v. Bevis, 289 So.2d 401 (Fla. 1974), the Supreme Court of Florida recognized that the failure to allow a utility to earn a fair rate of return violates the utility's rights to due process, just compensation for taking of property and the right to possess and protect property. Article I, Sections 2 and 9, and Article X, Section 6, Florida Constitution; Amendments V and XIV, United States Constitution. In this case, the Commission lacks the statutory authority to place SSU in the position where SSU's compliance with Commission statutes, rules and orders effects an unconstitutional taking of SSU's property and deprives SSU of its opportunity to earn a fair and reasonable rate of return consistent with the total revenue requirements ordered by the Commission in the Final Order and affirmed by the First DCA.

31. It has been suggested that SSU took a risk by implementing uniform rates when the rate structure issue later was appealed. SSU took no risk. As indicated in this Response, it would be unconstitutional and unlawful for the Commission to order refunds when revenue requirements are not at issue. SSU does not consider it a risk to implement rates approved by the Commission

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where a refund of revenues would require the Commission to act in an unconstitutional and otherwise unlawful manner. This is particularly so where the rates already have been implemented and charged to SSU customers prior to the filing of the appeal.

A Refund Requirement Would Violate the Proscription Against Retroactive Ratemaking

32. Florida law clearly prohibits the Commission from engaging in retroactive ratemaking. Retroactive ratemaking results when "new rates are applied to prior consumption" which occurred before the effective date of the new rates. Gulf Power Co. v. Cresse, 410 So.2d 492 (Fla. 1982). The requirement that SSU make refunds represents a classic case of retroactive ratemaking. A refund of final rates would entail the application of new stand-alone rates to customer consumption from September 1993 through the date of the implementation of new rates pursuant to the price index adjustment approved and effective on December 12, 1993. Such would violate the test of Gulf Power Co. v. Cresse. Further, the effect of such a refund would be to deprive SSU of any opportunity to earn its lawfully determined revenue requirements and associated returns during such period.

33. Moreover, any retroactive application of new stand-alone rates would have to be applied across the board to all customers. The principle of retroactive ratemaking makes no distinction between rate increases and rate decreases. This means that any "refund" requirement must be met by not only retroactively applying new stand-alone rates to customers with higher rates under stand-alone rates but also to customers with lower rates under stand-

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alone rates. In order to avoid imposing an unconstitutional taking of SSU's property by engaging in unlawful retroactive ratemaking, the Commission must reject the Joint Petitioners' request for refunds.

Refunds Would Impose a Penalty on SSU Not Authorized by Statute

34. The Commission has confirmed in the Order Vacating Automatic Stay that SSU implemented the approved uniform rates in accordance with Commission statutes, rules and orders. SSU properly filed its legally authorized uniform rates, moved to vacate the automatic stay and posted a bond in accordance with Commission rules in order to vacate the stay and continue billing the uniform rates. Thus, the effect of a refund would be to penalize SSU for its compliance with applicable law. Such a penalty would violate Article I, Section 18 of the Florida Constitution.[6]

SSU Implemented the Only Legally Available Rates

35. At the time the uniform rates were implemented there was no other lawfully available, Commission approved rates for SSU to charge. The continuing charging of the prior interim rates, as revised by the Final Order, would have resulted in the collection of revenues below that level approved by the Commission in its

[6]Article I, Section 18 of the Florida Constitution provides that "[n]o administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." Section 367.161, Florida Statutes (1993), subjects a utility to specifically enumerated financial penalties if the utility "knowingly refuses to comply with, or willfully violates any provision of this chapter or any lawful rule or order of the commission ...."

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Final Order, as reaffirmed on reconsideration and on appeal.

36. As the Commission emphasized in the Order Vacating Automatic Stay, it was Citrus County's failure to act which placed SSU in a position where its only options were to expeditiously seek relief from the stay (which SSU did) or pursue Commission approval of a new rate structure different than the uniform rate structure approved by the Commission. Citrus County failed to request a stay of implementation of the uniform rates when it filed its Motion for Reconsideration in April of 1993 challenging the statewide uniform rates. Worse, Citrus County waited until October of 1993 to appeal the Commission's decision and trigger the automatic stay. By that time, the "status quo" in effect prior to the automatic stay was the uniform rates because SSU had submitted and received approval of its tariffs in September of 1993 implementing the uniform rates.

37. SSU could not continue charging the interim rates, even at reduced revenue levels as requested by Citrus County, for two reasons. First, as previously stated, SSU's legally authorized rates were the uniform rates tariffed and effective in September of 1993. Secondly, the option of charging the interim rates was not available since "the Commission may ... authorize the collection of interim rates (only) until the effective date of the final order." §367.082(1), Fla. Stat. (1993). Since the rates and rate structure portions of the Final Order were placed into effect when SSU's uniform rates tariffs were approved effective September 15, 1993, interim rates were not available to SSU after September 15, 1993.

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38. Hence, the only available Commission approved rates for SSU after September 15, 1993 were the uniform rates. The Commission should not penalize SSU because Citrus County failed to request a stay of the uniform rates pending reconsideration nor for SSU's exercise of its right to implement the Commission approved rates.

Refunds Would Violate the Filed Rate Doctrine and Would Be Inconsistent with Commission Precedent

39. Any refunds imposed on SSU would violate the "filed rate" doctrine. The filed rate doctrine was established by the United States Supreme Court in Texas & Pacific Railway v. Abilene Oil Company, 204 U.S. 426 1907, and has been applied by federal and state courts "to bar recovery by those who claim injury by virtue of having paid a filed rate." Taffet v. Southern Company, 967 F.2d 1483, 1488 (11th Cir. 1992). Under the doctrine, "[w]here the Legislature has conferred power on an administrative agency to determine the reasonableness of a rate, the ratepayer 'can claim no rate as a legal rate that is other than the filed rate...'" Id. at 1494, citing Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951).

40. In Florida, the Legislature has established a statutory scheme under which, with certain exceptions[7], a utility may charge only those rates approved by the Commission. §367.081(1), Fla.

[7]Exceptions to this statutory scheme are found in Section 367.081(4), Florida Statutes (price index increases or decreases) and Section 367.081(6), Florida Statutes (implementation of rates subject to posting of security where Commission fails to vote on rate increase request within 8 months of filing).

Stat. (1993). An exception to the filed rate doctrine may apply in Florida where revenue requirements ordered by the Commission are modified on appeal. However, this is not always the case as evidenced by the Commission's recent decision authorizing GTE Florida Incorporated to recover expenses originally denied by the Commission and reversed on appeal on a prospective basis only where the final order was not stayed during pendency of the appeal.[8]

41. The GTEFL decision supports the proposition that a modification of revenue requirements on appeal may be applied only on a prospective basis where no stay was in effect during the appeal. Likewise, in this case, there was no stay in effect during the pendency of the appeal. If the Commission was not willing to apply a court ordered modification of revenue requirements on a retroactive basis where no stay was in effect, certainly it must reject the Joint Petitioners' request to retroactively apply a court ordered modification of a rate structure issue where no stay was in effect particularly where the result would be to lower SSU's court affirmed total revenue requirements. Stated another way, there is no authority in Florida for imposing an exception to the filed rate doctrine in a case involving a reversal of a Commission ordered rate structure.

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[8]See Application for a Rate Increase by GTE Florida Incorporated ("GTEFL"), Order No. PSC-95-0512-FOF-TL issued April 26, 1995.

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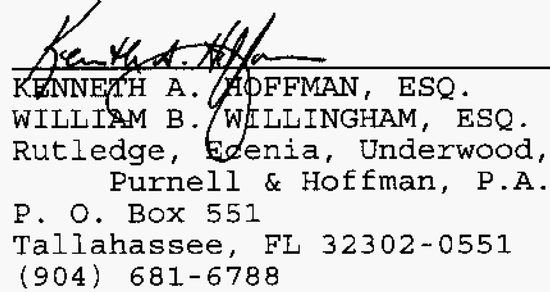
WHEREFORE, for the foregoing reasons, SSU respectfully requests that the Joint Petition be denied.

Respectfully submitted,



KENNETH A. HOFFMAN, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Southern States Utilities, Inc.'s Memorandum in Opposition to Joint Petition for Implementation of Stand-Alone Rates and Repayment of Overcharges was furnished by U. S. Mail to the following this 11th day of September, 1995:

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By: KENNETH A. HOFFMAN, ESQ.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Application for a rate increase by SOUTHERN STATES UTILITIES, INC.

DOCKET NO. 920199-WS

COPY

BEFORE:	CHAIRMAN J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER LUIS J. LAUREDO COMMISSIONER JULIA L. JOHNSON
PROCEEDING:	AGENDA CONFERENCE
ITEM NUMBER:	25A**
DATE:	November 23, 1993
PLACE:	106 Fletcher Building Tallahassee, Florida
REPORTED BY:	JANE FAUROT Notary Public in and for the State of Florida at Large

ACCURATE STENOTYPE REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(904) 878-2221

1 MR. HOFFMAN: If what, if the interim rates are
2 implemented?
3 CHAIRMAN DEASON: We have before us the question
4 of whether we are going to vacate the stay or not.
5 Regardless of whether the stay is vacated or not, is
6 Southern States going to receive the same dollar of
7 revenue from its customers?
8 MR. HOFFMAN: There is a difference.
9 CHAIRMAN DEASON: There is a difference, because
10 if the stay is vacated what rates will you collect?
11 MR. HOFFMAN: The final rates, which subject to
12 check, Mr. Chairman, amounts to a rate increase of
13 approximately $6.7 million. And if the automatic stay
14 is enforced, if it's not vacated and you then go to our
15 revised interim rates, I believe that, subject to
16 check, that revenue requirement is at 6.4 million.
17 It's a different number. But I would reiterate to you
18 that we do not believe there is any discretion and that
19 the rule is mandatory. But that's my answer to your
20 question, Mr. Chairman.
21 CHAIRMAN DEASON: Let me ask you this. If the
22 stay is vacated, do you agree that Southern States is
23 putting itself at risk to make those customers whole
24 whose rates are higher under statewide rates?
25 MR. HOFFMAN: No, I don't. But I don't think that

1 the Commission needs to resolve that issue today.
2 Because in our opinion, Mr. Chairman, we believe that
3 on a rate structure appeal, where we are implementing
4 the rates authorized by the Commission, in an appeal
5 which would be strictly revenue neutral, that the
6 Company does not place itself at risk. However, if we
7 are wrong in that position, and the first District
8 Court of Appeal reverses the Commission, there will be
9 a corporate undertaking or a bond on file with this
10 Commission to protect the customers in the event we are
11 wrong.
12 CHAIRMAN DEASON: Now, is that protection just for
13 the difference in revenue amounts and not
14 customer-specific?
15 MR. HOFFMAN: I think it could be tailored by the
16 Commission, Mr. Chairman. I think that the Staff
17 recommendation recommended a bond amount which would
18 protect the customers of the systems who are currently
19 paying higher rates under the uniform rates.
20 CHAIRMAN DEASON: Well, do you agree that if the
21 stay is vacated there are going to be customers that
22 are going to be paying more under statewide rates?
23 MR. HOFFMAN: Yes.
24 CHAIRMAN DEASON: And if the stay is vacated and
25 the appeal is successful on COVA and Citrus County's

1 part, you're saying there is not going to be a refund
2 to those customers who are paying more?
3 MR. HOFFMAN: Our position that we have taken, Mr.
4 Chairman, is that there is not a refund. And I think I
5 have already explained to you why. But what I'm saying
6 to you is we do not dispute, particularly now that
7 Public Counsel has filed an appeal and they are going
8 to put revenue requirements at issue, we do not dispute
9 the need for corporate undertaking or bond at this
10 point of this proceeding and we are willing to make
11 sure that it's posted.
12 CHAIRMAN DEASON: But that is a question of
13 overall revenue requirements, not customer-specific
14 rates?
15 MR. HOFFMAN: That's correct.
16 CHAIRMAN DEASON: Does Staff agree with that?
17 MS. BEDELL: Yes.
18 COMMISSIONER CLARK: Surely this has come up
19 before where we have had a rate design at issue. Maybe
20 it's not come up, maybe not in water and sewer.
21 MR. WILLIS: Commissioners, I can't remember in
22 the past where we had a rate design at issue after the
23 final decision of the Commission.
24 COMMISSIONER CLARK: Well, the fact of the matter
25 is it's not at all clear as to whether or not there

1 would be a refund for those people who overpaid based
2 on -- who would pay more under statewide rates than
3 stand-alone.
4 MR. WILLIS: That's correct.
5 COMMISSIONER CLARK: It's not at all clear that it
6 just wouldn't be from a going-forward standpoint that
7 you would address the rates, and the rates that were in
8 effect is water under the bridge.
9 MR. WILLIS: I agree with you, Commissioner, it's
10 not clear at all.
11 COMMISSIONER JOHNSON: So how do we make these
12 people whole? Or we can't.
13 MR. WILLIS: Well, Commissioner, I think if there
14 is protection in place, whether it be a corporate
15 undertaking or a bond, which we are recommending a
16 bond, those customers will be held whole. I mean, if
17 someone in the future dictates that those customers who
18 are paying more now under uniform rates than they would
19 be under stand-alone are deserving of a refund, then
20 those customers would receive a refund with interest.
21 COMMISSIONER CLARK: That's the part that's not
22 clear, that we have never addressed before when it's an
23 issue of money between customers and not the overall
24 revenue what you do.
25 MR. WILLIS: (Indicating yes.)

1 MR. HILL: The customers are going to be
2 protected. There is not a doubt in my mind about that.
3 It's the Company that's going to be at risk, and I
4 won't try to drag this out to explain it.
5 COMMISSIONER CLARK: But I think that Commissioner
6 Johnson is correct, is that the customers as a whole
7 are protected, but not individual customers that under
8 statewide rates are paying more than they would under
9 stand-alone.
10 MR. HILL: I believe that if the courts say --
11 COMMISSIONER CLARK: A bond doesn't address that
12 at all.
13 MR. HILL: I understand. And if the courts say
14 that you cannot do what you have done, then you have
15 got to go back to a system-specific rate and revenue
16 requirement. That's where you have to go, there is no
17 other place to go. And we may end up arguing with the
18 utility over refunds, but there isn't a doubt in my
19 mind that if we are reversed on that and have to redo
20 it, they have collected money they should not have
21 collected and it will have to be refunded. And the
22 Company will end up on the short end of it.
23 COMMISSIONER CLARK: Well, they have collected
24 money they should have recovered from the wrong people.
25 MR. HILL: Absolutely, and they will have no way

1 would be a refund for those people who overpaid based
2 on -- who would pay more under statewide rates than
3 stand-alone.
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21 collected and it will have to be refunded. And the
22 Company will end up on the short end of it.
23 COMMISSIONER CLARK: Well, they have collected
24 money they should have recovered from the wrong people.
25 MR. HILL: Absolutely, and they will have no way

1 to go back to the right people and collect those funds.

2 COMMISSIONER CLARK: Unless you do an adjustment

3 on a going-forward basis to remedy that, but I'm not

4 sure you can.

5 CHAIRMAN DEASON: And what Mr. Hoffman is saying,

6 it's his opinion that the Company is not putting itself

7 at risk, it does not have the liability to make the

8 customer-specific whole. Their only requirement is to

9 make customers as a general body of ratepayers whole.

10 That is, if they have collected more total revenue than

11 what they are authorized as a result of the final

12 decision on appeal, they are liable for that, but they

13 are not liable to make specific customers whole.

14 MR. HILL: And while that's an interesting

15 argument, I think that if indeed we are overturned by

16 the courts, then the revenue requirements fall out on a

17 system-specific basis, and I think the Company will be

18 on shaky ground with that argument and will lose money.

19 MS. BEDELL: May I make a suggestion? In terms of

20 trying to make a determination of what the Company may

21 have to do in terms of a refund, under both the

22 appellate rule on stays -- it provides that you can set

23 conditions for the stay, or for vacating the stay it

24 would seem to me. If you set a condition related to

25 how, you know, the end result when the appellate court

1 makes a final decision.

2 CHAIRMAN DEASON: I understand what you're saying,
3 but wouldn't it be unfair to Southern States to say
4 that we are going to vacate the stay and put you at
5 risk for making those customers who pay more, but we
6 are not going to give you the opportunity to recoup
7 from those customers who should have paid more but who
8 did not pay more? Isn't that a very difficult position
9 to put the Company in?

10 MS. BEDELL: Yes, I think so. The whole situation
11 is difficult.

12 CHAIRMAN DEASON: Oh, I agree with that. I think
13 you can get a unanimous decision on that right now. I
14 think even the parties would stipulate to that.

15 COMMISSIONER JOHNSON: Mr. Hoffman, how would you
16 respond to the argument posed by opposing counsel that
17 Rule 25-22.061(3) does not include a mandatory nature
18 behind it, and that that would be a constitutional
19 violation?

20 MR. HOFFMAN: The first time I've heard it is
21 today. If they are saying that the word shall does not
22 include a mandatory nature, I can only tell you that my
23 common meaning of that word in the research I've done
24 on statutory interpretation tells me they are wrong. I
25 think Commissioner Clark summed it up, she said to Mr.

1 Gross you are saying that we have an illegal rule, or
2 an invalid rule. I disagree with that. I think the
3 Commission has a valid rule, and that that rule is
4 within its discretion.
5 COMMISSIONER CLARK: And, Commissioner Johnson, if
6 memory serves me correct, we were encouraged by the
7 court, and I'm not sure if it was the Supreme Court, it
8 may have been. They got tired of dealing with motions
9 to vacate stays, and they told us -- how did they tell
10 us? In oral argument I can recall some pointed
11 questions being why don't you have any rules that state
12 the circumstances under which a stay will be granted so
13 that they don't have to deal with it again. That
14 doesn't dispose of the question as to whether we did it
15 right, but it was certainly my recollection that the
16 court was tired of dealing with the stays and wanted us
17 to deal with them.
18 CHAIRMAN DEASON: Do we have the option of letting
19 them deal with it?
20 COMMISSIONER CLARK: I think they would admonish
21 us for not doing what the rule said we should do.
22 CHAIRMAN DEASON: Commissioners, I think we need
23 to move along. If we are ready for a motion now, fine,
24 if we're not, I suggest we just take a ten-minute
25 recess and come back and then dispose of this as

1 quickly as possible. What's your pleasure? In other
2 words, let's move along one way or the other.
3 COMMISSIONER CLARK: Mr. Chairman, I don't see
4 that we have any discretion, and I agree with
5 Commission Staff on this point. I think we set out the
6 rules that indicate that a posting of a bond will allow
7 us a vacation of the stay, and as Mr. Hoffman pointed
8 out, the Commission order, which did concern me, only
9 provided for a stay of refund of the interim rates, it
10 wasn't with respect to the implementation of the rates.
11 And for that reason I would move Staff on all three
12 issues.
13 COMMISSIONER JOHNSON: Second.
14 CHAIRMAN DEASON: It has been moved and seconded.
15 Let me state right now that I'm going to vote against
16 the motion. I am persuaded by the argument that we are
17 moving into a new area here where there are differences
18 between rates for different customers in different
19 areas, and that in my opinion we should keep the status
20 quo, which are interim rates, and let the court give
21 the guidance to the Commission that it sees fit. I
22 don't see where -- even though there is going to be a
23 bond posted, it's not going to be for the purposes of
24 making individual specific customers whole, it's going
25 to be for the purpose of making customers as a total

1 rate paying body whole. And that's really not the main
2 crux of this appeal, so I would oppose that. But,
3 anyway, we have a motion and a second --
4 COMMISSIONER CLARK: Mr. Chairman, can I just ask
5 a question? The concern I have is the interim rates
6 don't generate the rates that we concluded they were
7 entitled to. I mean --
8 CHAIRMAN DEASON: The interim rates, what are the
9 differences between the interim rates and the final
10 rates that have a statewide rate structure? Very
11 minimal, is it not?
12 MR. TWOMEY: They generate more, Mr. Chairman.
13 CHAIRMAN DEASON: That's what I thought. I
14 thought it was either minimal or it either generated
15 more. What's the case, Mr. Hoffman?
16 MR. HOFFMAN: My understanding is that as revised,
17 the interim rates as revised after Commissioner Clark's
18 motion for reconsideration is a total revenue
19 requirement increase of 6.4 million as opposed to 6.7
20 million final rates.
21 COMMISSIONER CLARK: Which is the final rates?
22 MR. HOFFMAN: Yes.
23 CHAIRMAN DEASON: I consider that difference to be
24 pretty inconsequential given the magnitude of the real
25 issue, which is the rate structure involved. I would

1 just keep interim rates.
2 Moved and seconded, all in favor say aye.
3 COMMISSIONER CLARK: Aye.
4 COMMISSIONER JOHNSON: Aye.
5 CHAIRMAN DEASON: All opposed nay. Nay.
6 MR. TWOMEY: Mr. Chairman, pardon me. Can we ask
7 that either you make it clear in your vote that you are
8 ordering the Company to establish a bond that would
9 hold -- the customers would have to pay the subsidies
10 whole if there is a reversal on appeal, or conversely
11 that you make it clear that you accept that there is no
12 way to make these customers whole, assuming a reversal
13 on appeal, and that you're not going to do anything
14 about it. I mean, it's not clear to me which way you
15 come down on that. That you're going to accept the
16 Company's argument that they will make all the
17 customers whole on a revenue basis, but that the people
18 that pay too much, if there is a reversal, it's too bad
19 except on a going-forward basis. I'm asking you to
20 make it clear that you're telling them they have to get
21 that kind of bond, or make it clear that you're not.
22 MR. HOFFMAN: Mr. Chairman, let me object. I
23 don't think Mr. Twomey is being very clear. I think
24 that the Staff's recommendation is clear. And I think
25 that we can have that -- we already have a bond on

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1 file. We can get the nature of the bond changed to fit
2 what is required in the Staff recommendation, and I
3 think that that dollar amount will be sufficient to
4 meet either consequence. We are sitting here
5 speculating about what may happen on appeal. We simply
6 don't know. I mean, I know the staff has estimated $3
7 million, but that is based on the rate design issue
8 alone. I don't know what else Public Counsel may raise
9 that may have a revenue requirement impact. And I
10 think this is unnecessary, and I object to it, and I
11 think it makes the issue more cloudy.
12 CHAIRMAN DEASON: Well, Mr. Hoffman, I think not
13 only is it relevant, it is critical to know what the
14 nature of the motion is and what is being done. Now,
15 I'm not on the winning side of the motion, so I don't
16 know how to clarify it, because I'm not even supporting
17 it. If the Commissioners wish to clarify it, they will
18 have the opportunity now.
19 COMMISSIONER CLARK: I have moved Staff
20 recommendation. Now, the issue of whether or not a
21 refund will be due to the customers I don't think is
22 before us right now.
23 MS. BEDELL: What is before you is a decision
24 about whether there is good and sufficient security for
25 anything that may be coming down the pipeline.

1 COMMISSIONER CLARK: Now, will the bond cover
2 that? Let me just ask the question. Without deciding
3 the issue as to whether or not there will be a refund
4 to only those customers who are overcharged, and not a
5 making up of that revenue from the other customers.
6 Let's assume that our order is that you will only
7 refund to those who are overcharged. Will the bond
8 cover that?
9 MS. BEDELL: Yes.
10 MR. WILLIS: Commissioners, we believe the bond
11 will cover it. It's just like any rate case, it will
12 have to be reviewed at the end of one year to see if --
13 you know, we don't know how long the appeal is going to
14 be, but it will have been reviewed after one year, and
15 if the appeal is not done, it will have to be up for
16 whatever amount we believe it will have to be
17 protected.
18 CHAIRMAN DEASON: Let me make sure that we are
19 clear. What you're saying is that if that is the final
20 decision, the bond is adequate?
21 MR. WILLIS: Yes.
22 CHAIRMAN DEASON: But that is not the position the
23 company is arguing, they're saying it is not their
24 belief they are putting themselves subject to that
25 liability.

1 COMMISSIONER JOHNSON: I thought that point was
2 made painfully clear what the Company thought, but
3 Staff sufficiently satisfied me that it was something
4 that we could make those customers whole, and perhaps
5 that is something that we should definitely have
6 written in the order.
7 MS. BEDELL: That is what we had in mind in terms
8 of coming up with a dollar number. That is the
9 direction we headed in to come up with some
10 recommendation on a dollar amount. Mr. Chairman, we
11 need to know if you are dissenting on Issue 2 only, or
12 on Issue 2 and 3.
13 CHAIRMAN DEASON: Well, let's take a look at that.
14 MS. BEDELL: Issue 3 is Citrus County's motion for
15 the penalties and the reduction in rates, refund of
16 bills.
17 CHAIRMAN DEASON: Okay. We already disposed of
18 Issue 1.
19 MS. BEDELL: Yes, sir.
20 CHAIRMAN DEASON: I'm dissenting on Issue 2, but
21 I'm agreeing with Staff on Issue 3.
22 MS. BEDELL: Thank you.
23 MR. GROSS: This is an appealable order to the
24 First District Court of Appeal, so we need an order so
25 that we can avoid some of the problems we have had in

1 the past, and also the provisions in the bond are going
2 to be of interest to the First District Court of Appeal
3 as to whether there was an adequate bond in compliance
4 with the Commission's rule. Even if it is determined
5 to be mandatory, there is still that --
6 COMMISSIONER CLARK: Doesn't the bond have to
7 cover the whole amount of the rate increase, so
8 therefore it covers anything --
9 MR. HOFFMAN: Commissioner Clark, I think that
10 every issue in the rate case is put at issue in the
11 appeal, I think it would.
12 COMMISSIONER CLARK: All we need to do at this
13 point is make sure that the total amount of the bond is
14 sufficient to cover the total amount of the rate
15 increase, because it's still at issue, and covered in
16 that is the amount of any refund that would be due, if
17 it is decided that a refund is due to those people who
18 paid more under statewide rates than they would have
19 paid under stand-alone rates. And it's my
20 understanding from the Staff that it does, and that is
21 what we need to decide today.
22 CHAIRMAN DEASON: And an order will be
23 forthcoming, and it will describe what the Commission
24 did.
25 MR. HOFFMAN: Thank you, Mr. Chairman.

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